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No. 90-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI,

Petitioner,

—v.—

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its over 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

The ABA has a longstanding interest in the Equal Access to Justice Act ("EAJA" or "Act"). The ABA participated in the debates leading to its passage and strongly supported its enactment as an incentive to responsible government action and as a means to ensure that individuals have access to legal services. The ABA was also an early supporter of the Administrative Procedure Act ("APA") and assisted in the APA's drafting and development.

The ABA also has an historic interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration and refugee laws. Consistent with these principles, and to help implement them, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983. This Committee, made up of representatives of nine ABA entities with specialized expertise (*e.g.*, administrative law), has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel aliens and represent them in the context of deportation and other proceedings before the Immigration and Naturalization Service ("INS"). The ABA supports the application of the EAJA to deportation proceedings as an important incentive that is consistent with these efforts and with the fundamental purposes of the Act.

The ABA appears as *amicus curiae* in the case because Petitioner raises an issue that is critical to the continued operation of the EAJA as a means of access to justice in administrative proceedings. The ABA has received the consent of all parties to this case.*

* Three "of counsel" on this brief are attorneys in a law firm which represents petitioner in *Hashim v. INS*, U.S. Court of Appeals for the Second Circuit (Docket No. 90-4125, decision pending after argument). None participated in the briefing or prosecution of that matter in which Hashim urges that EAJA apply to deportation proceedings. That issue has not been decided in the Second Circuit.

SUMMARY OF ARGUMENT

1. Deportation proceedings, which are substantially identical to the adversary adjudications defined by Section 554 of the Administrative Procedure Act ("APA"), are subject to the EAJA. The statute and legislative history of the EAJA distinguish adversarial adjudications from non-adversarial proceedings, such as rulemaking, and Section 554 is used in the EAJA as a guide to that distinction. Interpreting "under Section 554" to mean "as defined by" Section 554 furthers the explicit congressional intent to limit the EAJA to adversarial contexts. In contrast, interpreting the phrase "under Section 554" to mean "subject to Section 554" would exempt agencies from EAJA's remedial mechanisms on the wholly arbitrary basis of the formal relationship of an agency's governing statute to the APA. This result would subvert the fundamental purpose of the EAJA, which is to create access to the adjudicatory system for individuals unjustifiably aggrieved by any governmental agency.

2. Deportation proceedings epitomize the situation the EAJA was designed to address. Individuals who are frequently indigent, often unskilled in the English language, and untutored in this country's basic customs and institutions must navigate a baffling regulatory system to obtain fundamental rights in complex legal proceedings where process often determines the outcome. They are pitted against an agency whose policies and actions have been the target of frequent criticism. And they are largely unrepresented by counsel in circumstances where counsel has been demonstrated to make a significant difference.

ARGUMENT

The Petitioner is a sixty-two-year-old Iranian woman who prevailed in administrative deportation proceedings brought on by order to show cause by the Immigration and Naturalization Service ("INS"). A hearing was held in an Immigration Court. An Immigration Judge presided. Her claim was

opposed by a government "trial attorney." Live testimony was taken and documents were placed in evidence. A contemporaneous record of proceedings was made. A decision was made based on the record. In short, there was an adjudication after trial.

For two and a half years, Petitioner's request for political asylum was opposed "even though the INS knew that the State Department had determined that [she] had a well founded fear of persecution." *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505, 1515 (11th Cir.) (Pittman, J., dissenting), *reh'g denied*, 915 F.2d 698 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991).[1] Without similar determination and resources, others entitled to statutory benefits would earlier on have abandoned the process and been deported.

To benefit persons who "may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights in civil actions and administrative proceedings," Congress enacted the Equal Access to Justice Act ("EAJA" or "Act"). Congressional Findings and Purposes, note following 5 U.S.C. § 504.

EAJA provides reasonable counsel fees to those who prevail over government opposition that is substantially unjustified. Its fee-shifting mechanism applies to civil actions. 28 U.S.C. § 2412(d) ("civil EAJA"). It also gives relief to persons who prevail in administrative proceedings. 5 U.S.C. § 504 ("Section 504" or "administrative EAJA"). Nonetheless, the INS consistently opposes the application of administrative EAJA to its agency proceedings, often on hypertechnical grounds. It seeks to defeat, in adversarial proceedings, use of this important remedial legislation by a class of statutory beneficiaries who are often poor, who are unsophisticated about legal matters, who face drastic consequences from the misapplication of law or the failure to document adequately a hearing record, and who are largely unrepresented. As set forth below, this Court should hold that EAJA applies to INS deportation proceedings.

1 To avoid burdening the Court with repetitive statements, Amicus ABA respectfully directs the Court to the briefs filed by the parties for a statement of the relevant facts and statutory texts.

I. THE STATUTE BY ITS TERMS CLEARLY ENCOMPASSES THE ADVERSARY ADJUDICATIONS EMBODIED IN DEPORTATION PROCEEDINGS

Section 504 directs "[a]n agency that conducts an adversary adjudication" to shift the fees and costs incurred in prevailing against the United States in that adjudication when the position of the United States was not substantially justified. 5 U.S.C. § 504(a)(1). The relevant definitional provision of Section 504 states that " 'adversary adjudication' means . . . an adjudication under Section 554 of [the Administrative Procedure Act ("APA")] in which the position of the United States is represented by counsel or otherwise. . . ." 5 U.S.C. § 504(b)(1)(C).

The heart of the conflict among the circuits as to whether deportation proceedings fall within the ambit of Section 504 appears to be a debate over the semantics of the word "under." The procedures for deportation hearings are substantially identical to the procedures "defined under" the APA; however, INS procedures are set forth "under the authority" of the Immigration and Nationality Act ("INA"), rendering the APA redundant.[2] *Compare Escobar Ruiz v. INS*, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc) (" 'an adjudication under Section 554' means 'an adjudication as defined by Section 554' "); *and Clarke v. INS*, 904 F.2d 172,

2 The procedural requisites for deportation hearings were modelled after the procedures set forth in the APA and conform to them in all major respects. *See Marcello v. Bonds*, 349 U.S. 302, *reh'g denied*, 350 U.S. 856 (1955) *and* 8 C.F.R. §§ 2.1, 3.0 and 100.1-100.2 (1990) (as amended), which eliminated the difference between INA and APA procedures that was the sole issue in *Marcello*. *Compare* 5 U.S.C. §§ 554-557 (from the APA) with 8 U.S.C. § 1252(b) (from the INA) and implementing regulations at 8 C.F.R. pts. 3, 242 (1990) (as amended).

178 (3d Cir. 1990) (the "meaning of ['under Section 554'] is that the EAJA is to apply only to those proceedings conducted under the authority of Section 554").

The proper interpretation of "under Section 554" is "as defined by." The phrase appears in the section of the statute that defines the proceedings to which administrative EAJA applies, and functions there as a definition of the characteristics of those proceedings—i.e., adversarial adjudications, as distinguished from rulemaking or other non-adversarial proceedings. In this role, the term "under Section 554" supports the legislative text and history. Indeed, it is only with this construction that the phrase may operate without subverting the fundamental purposes of the EAJA.

The EAJA is founded equally on the premises that: (1) it is in the public interest to challenge unreasonable government action; and (2) it is expensive to litigate against the government:

> [The EAJA] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4988. The EAJA's remedial mechanism is therefore designed to function in settings where the government acts as an adversary.

In civil EAJA, the limitation to adversary proceedings is self-defining because a civil litigation is always adversarial. In administrative EAJA, the limitation must be made explicit, not only as consonant with the Act's overall function, but also on grounds of fairness. While the EAJA seeks to level the playing field, it is only fair that the government be represented on that playing field:

> The bill . . . limit[s] administrative proceedings to "adversary adjudications" in which the position of the U.S. is represented. It is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented.

H.R. Rep. No. 1418, *supra*, at 11-12.[3] The role of Section 554 as a guide to the procedural characteristics that make a proceeding an "adversary adjudication" for purposes of administrative EAJA furthers congressional efforts to provide a parallel for civil EAJA in the context of administrative remedies.

In contrast, defining "under Section 554" to mean "subject to" or "under the authority of" does not distinguish among types of proceedings; rather, it only would distinguish among different agencies.[4] A proceeding held "under the authority of" Section 554 is not only a proceeding with certain substantive characteristics, it is a proceeding conducted only by agencies who are technically subject to the APA, even though other agencies' governing statutes provide for equivalent formal hearings. Thus, any agency whose governing statute can be read to mandate adherence to the APA would be covered by the EAJA, but if its governing statute deviates from or supercedes the APA, the EAJA would not apply—even if the procedural context gives the claimant the same or greater procedural protections against the agency than does the APA.

That result, clearly not compelled by the statutory language, is wholly at odds with "the specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of

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3 Administrative EAJA's limitation to adversary adjudications is also dictated, in part, by economics:

> In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable.

H.R. Rep. No. 1418, *supra*, at 14.

4 By this definitional exercise, EAJA's application would be narrowed, as INS argues in this case. However, Congress expressly rejected a "subject to" provision, and this Court should not impose one by *post hoc* decision. *See infra* at p. 12 & n.9.

Government authority.' " *Commissioner, INS v. Jean*, 110 S. Ct. 2316, 2322 (1990), quoting H.R. Rep. No. 1418, *supra*, at 12 (emphasis added). It places certain agencies entirely outside of the reach of administrative EAJA, not on grounds of any reasoned policy or presumption, but solely on the basis of the formal—and often indistinct—relationship between that agency's governing statute and the APA.[5]

There is not a shred of support anywhere in the EAJA's legislative text or history for finding a congressional intent to apply EAJA's reforms to anything less than the government as a whole. The statute and legislative history refer throughout to "the Government," the "United States" or "federal agencies."[6] Section 504 itself applies to "an agency," which is defined to mean "*each authority of the Government of the United States*, whether or not it is within or subject to review by another agency. . . ." 5 U.S.C. § 551 (emphasis added). *See* 5 U.S.C. § 504(b)(2) ("the definitions provided in section 551 of this title apply to this section").[7]

Although the phrase "under section 554" appears in the statute, and occasionally in the legislative history, these

5 In the context of deportation proceedings, for example, this Court held in *Marcello v. Bonds*, 349 U.S. at 310, that where detailed and specific INA procedures deviate from the APA, the INA applies. Because the Court termed this relationship an "exemption" from the APA, even though the deviation at issue in *Marcello* has since been eliminated by regulation, the INS has asserted wholesale immunity from EAJA awards in its administrative adversarial adjudications. The principles underlying a congressional effort to protect parties to administrative proceedings by legislating protections equivalent to those set forth in the APA simply cannot be reconciled with an exercise in statutory construction of the EAJA that *deprives* those same parties of the EAJA's incentive to minimally responsible agency action.

6 The preface to the EAJA states that "[i]t is the purpose of this title . . . to diminish the deterrent effect of seeking review of, or defending against *governmental* action. . . ." Congressional Findings and Purposes, note following 5 U.S.C. § 504.

7 Section 551 exempts from the definition of agency the Congress, courts, and local and military authorities, which is consistent with administrative EAJA's function as a remedy in administrative settings.

sources contain no discussion of technical issues of governance, and for the most part make no reference to Section 554 in connection with administrative EAJA. Rather, the legislative materials repeatedly conjoin administrative EAJA's "adjudications" and civil EAJA's "actions," emphasizing both the generality of Section 504's application vis-a-vis the government, and the specificity of an adjudication's nature as adversarial.

The House Report describes the inception of the bill as an effort to shift fees in adversarial proceedings:

> During the 96th Congress, several bills were introduced in both houses to expand the liability of the United States for attorneys fees *when it loses an administrative proceeding or a civil action*.

H.R. Rep. No. 1418, *supra*, at 6 (emphasis added).

The statements of general purpose contained in both the House and Senate Reports define a reach of administrative EAJA that is qualified only by the adversarial nature of proceedings. Pointedly, Congress does not refer to the APA or use the defined term "adversary adjudication." Rather, Congress uses interchangeably the terms "adjudication," and "administrative adjudication" in contexts that emphasize the adversarial nature of the proceedings in question:

> Under [the Act] certain *parties who prevail in administrative adjudications or civil actions brought by or against the United States* will be entitled to attorney fees and related costs unless the Government action was substantially justified.
>
> . . . .
>
> *An adjudication or civil action provides a concrete, adversarial test* of Government regulation and thereby ensures the legitimacy and fairness of the law. *An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate*, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recog-

> nizes that the expense of correcting error on the part of the Government should not rest wholly *on the party whose willingness to litigate or adjudicate* has helped define the limits of Federal authority.

S. Rep. No. 253, 96th Cong., 1st Sess. 4, 6 (1979) (emphasis added); *see also* H. Rep. No. 1418, *supra*, at 9, 10.

The statement of the purpose of administrative EAJA set forth in paragraph 14 of the Conference Report on the EAJA as enacted in 1981 is similarly unencumbered by any reference to issues of technical governance or distinctions among agencies:

> The . . . bill requires a Federal agency or department *that conducts an adversary adjudication* to award to a prevailing party other than the United States fees and other expenses. . . .
>
> . . . .
>
> The *conferees direct the United States to pay attorney fees* and other expenses to a prevailing party other than the United States *in an agency adversarial adjudication* unless the position of the government is found to be not [sic] substantially justified or where special circumstances make the award unjust. *An adversarial adjudication is one in which the agency position is represented by counsel or otherwise.*

H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5010 (emphasis added).[8]

8 Several legislators, including a co-sponsor of the bill, state these themes plainly:

> This bill would . . . combat the growing tendency of escalating legal and related costs deterring [individuals] from *enforcing and defending their legal rights against the Federal Government in its regulatory capacity.*
>
> *The basic problem to overcome is the inability . . . to combat the vast resources of the Government in administrative adjudication.* In

In the context of these unambiguous statements of the intended function of the EAJA, Congressional reference to Section 554 should only be read as a guide to the procedural characteristics of an "adversarial administrative proceeding." There is simply no basis in Congress' expansive statement of purpose to infer from any statutory language an intent to exclude agencies from EAJA's reach. Even when Section 554 appears in the section-by-section analysis of the Committee Reports, it is used to define categories of proceedings and not categories of agencies:

> The section covers *only* ["adversary" included in House Report] *adjudications* under 554 of title 5 and *not rulemaking or other administrative proceedings.* In part, the decision to award fees *only in agency* ["adversary" in House Report] *adjudications* reflects a desire to narrow the scope of the bill in order to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies. *In these*

> the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of rights to be asserted.

125 Cong. Rec. 21,435, 21,437 (1979) (statement of Sen. Domenici, co-sponsor of the EAJA) (emphasis added).

> Ironically, it appears that American justice has become too costly for the average American budget. The cost of attorneys fees, *the cost of putting together a case and seeing it through an administrative proceeding* or the courts, the cost of paying expert witnesses and developing facts, can all come to much more than the cost of simply giving in. . . . This bill seeks to create an atmosphere in which citizens are not intimidated by litigation cost.

125 Cong. Rec. 21,435, 21,436 (1979) (statement of Sen. Dole) (emphasis added).

> Under the current provisions of the Equal Access to Justice Act, *administrative proceedings where the Government is represented by counsel are covered.*

131 Cong. Rec. S9994 (daily ed. July 24, 1985) (statement of Sen. Heflin) (emphasis added).

> *situations, in order to insure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating*. An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole.

S. Rep. No. 253, *supra*, at 15-16; H.R. Rep. No. 1418, *supra*, at 14 (emphasis added).

That section-by-section analysis uses Section 554 to distinguish adversary adjudications from rulemaking, and throughout is concerned with defining those proceedings where a party would need to "recover the costs of litigating." *Id.* There is nothing in the section-by-section analysis or elsewhere in the legislative history to indicate that Congress considered "participants [with] a concrete interest at stake" to be distinguishable according to the identity of the agency affecting that interest. *Id.*

The joint explanatory statement issued by the Conference Committee on EAJA as enacted in 1981 confirms Section 554's role in distinguishing proceedings rather than agencies. The Committee states that the Act "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, *supra*, at 23. Any question as to whether "defined under" might mean "subject to" is removed by the fact that this statement appears in the Committee's explanation of its substitution of "under" for the Senate language "subject to."[9]

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9 The Senate version of the bill incorporated "subject to Section 554" not only in the definitional provisions of Section 504, but also in the operative text. The Senate version contained a Section 504(a) that stated "[a]n agency *that conducts an adjudication subject to section 554* of this title shall award . . . ." and a definitional section 504(b)(1)(C) that stated in its entirety: " 'adjudication subject to section 554 of this title' does not include adjudication for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license." *See* S. Rep. No. 253, *supra*, at 24.

There is no economy of language effected by Congress' removal of the language "subject to." *Contra St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989). The conference replaced thirty-eight words with forty-nine words. Of the original thirty-eight words, only the words "subject to" do not re-appear. Of the forty-nine replacement words, the words that are new are "adversary," "under"—which is stated by the Conference Committee to mean "defined under"—and "in which the position of the United States is represented by counsel." Perhaps Congress' intention to refer to the substance rather than the reach of Section 554 could be stated more clearly, but "under" obviously is a more encompassing formula than "subject to," and, if it meant only "subject to," there was no need for the substitution. *Cf. Marcello v. Bonds*, 349 U.S. at 309 ("Were the courts to ignore these provisions . . . the painstaking efforts detailed above would be completely meaningless.").

Any inference of a congressional intent to distinguish among agencies subject to the EAJA by virtue of their relationship to the APA is further—and thoroughly—undermined by the Conference Report's use of Social Security Administration proceedings to illustrate the intended meaning of "adversary adjudication." *See* H.R. Conf. Rep. No. 1434, *supra*, at 23. Congress surely was aware that this Court has declined to resolve a debate as to whether the APA governs Social Security disability claims. *See Richardson v. Perales*, 402 U.S. 389, 409 (1971) ("[W]e need not decide whether the APA has general application to social security disability claims, for the social security administration procedure does not vary from that prescribed by the APA.").

Indeed, the Conference Report's explicit reference to the Social Security Administration can only be read to indicate Congress' exclusive concern with the distinction between adversarial and non-adversarial proceedings:

> It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudica-

> tion. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.

H.R. Conf. Rep. No. 1434, *supra*, at 23. There is no discussion of technical issues of governance here. Rather, Congress unambiguously describes the difference between proceedings in which the agency is acting as an adversary and those in which it is not.

In re-enacting the EAJA in 1985, Congress reiterated the Act's application to Social Security proceedings, describing hearings in which the agency is represented before an administrative law judge as "precisely the type of situation covered"—language that again relates to the substance of procedures and ignores technical issues of authority under the APA:

> One issue which needs clarification is what coverage, if any, is allowed under the Equal Access to Justice Act for Social Security Administration hearings at the administrative level. As enacted in 1980, *the Act covers "adversary adjudications"*—i.e., an adjudication under Section 554 of [the APA] "in which the position of the United States is represented by counsel or otherwise." . . . It is the committee's understanding that the Secretary of Health and Human Services has implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. *This is precisely the type of situation covered by Section 504(b)(1)(C). While, generally, Social Security administrative hearings remain outside the scope of this statute, those in which the Secretary is represented are covered by the Act.*

H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138 (emphasis added).[10]

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10 At the time, the EAJA's application to INS deportation proceedings had not been adjudicated. This would explain the absence of specific references to such proceedings in the 1985 legislative materials.

The remedial purpose of the EAJA is to encourage persons aggrieved by agency action to vindicate their rights undeterred by the expense of litigating against the government. *See generally* H.R. Rep. No. 1418, *supra*; S. Rep. No. 253, *supra*; *Commissioner, INS v. Jean*, 110 S. Ct. 2316 (1990). Congress itself has expressed dissatisfaction with overly narrow interpretation of the EAJA.[11] "It is the plain duty of the courts . . . to construe . . . remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45, *modified on other grounds*, 339 U.S. 908 (1950).

Section 504's specific purpose is to create a fee-shifting incentive in the context of adversary adjudications where the government is represented by counsel or otherwise—proceedings that are distinguishable from other administrative proceedings by procedural characteristics and degree of burden and expense. It would utterly disserve this purpose to distinguish among agencies by reference to debated technicalities—and thereby create for INS an immunity to the EAJA's remedial incentive that was neither expressed nor intended.

II. IMMIGRATION HEARINGS EPITOMIZE THE CIRCUMSTANCES IN WHICH THE EAJA WAS INTENDED TO APPLY

Deportable aliens face the most severe measure that can be meted out by a federal agency. In the words of Justice Brandeis, deportation may "result . . . in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *See also Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *Bridges v. Wixon*, 326

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11 *See, e.g.*, H.R. Rep. No. 120, *supra*, at 9 (in reporting that EAJA awards totalling $3.9 million since the inception of the Act were "dramatically less than the $100 million annual cost estimated by the Congressional [Budget] Office . . . and higher amounts predicted by the Justice Department," Congress noted with dissatisfaction that "[p]art of the problem in implementing the Act has been that agencies and courts are misconstruing the Act").

U.S. 135, 154 (1945). Its consequences are even graver when a deportation order erroneously rejects a claim for political asylum, as this Court observed in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987): "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."

Applicants for political asylum are uniquely vulnerable to abusive or unreasonable agency practices. They are frequently lacking in education, command of the English language, and the most basic familiarity with this country's customs and institutions. Yet, to obtain their rights, aliens must navigate "a baffling skein of provisions" resembling "King Minos's labyrinth in ancient Crete," *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). And they must often do so without the guidance of counsel to a degree that demonstrably results in injustice.

Asylum applicants are frequently indigent and are generally ineligible for representation by legal services offices using Legal Services Corporation funding. *See* 45 C.F.R. §§ 1626.3, 1626.4 (1990). Unofficial estimates provided by the Lawyers Committee for Human Rights and a government official at the Executive Office for Immigration Review ("EOIR"), the body in charge of the Immigration Courts, suggest that one-third to one-half of all asylum applicants are unrepresented by counsel. *See* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 261 (1990) ("Anker Study").

The problem of representation is aggravated by the growing number of asylum seekers who are detained in remote areas of the country. An ABA delegation to facilities in South Texas where thousands of aliens are detained found that:

> There are currently only two and a half full time pro bono lawyers who counsel and represent asylum applicants in South Texas and a handful of legal assistants

> and private attorneys to support them. All the programs and legal representatives with whom we met are deeply troubled that thousands of prospective applicants are unaware of their rights and that only the most persistent or resourceful individuals can succeed in securing legal assistance.

ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas* (ABA, July 1989) ("ABA Asylum Report") at 18. (Copies of this document have been lodged with the Clerk of the Court.)

In summary, the delegation found that:

> The level of available free legal representation is grossly inadequate given the size of the detained population. Effective representation is further impeded by the distances between detention facilities, limitations on access to detainees, and multiple court locations.

Id. at 19.

In detention centers located at El Centro, California, Florence, Arizona, and Oakdale, Louisiana, another study found that "there has rarely been available more than one attorney at any given time to represent the hundreds of aliens in need of representation on a pro bono basis; those attorneys available are hopelessly backlogged and unable to represent adequately the large numbers of aliens needing representation." Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987).[12]

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12 The application for fees in this case seeks to charge the government with the legal expenses only of that small percentage of applicants who would otherwise be unable to press *meritorious* claims, and then only when the applicant can demonstrate that the agency's opposition lacked substantial justification. *See* 5 U.S.C. § 504(a)(1). The Act also provides that an award may be reduced or denied when an EAJA applicant has "engaged in conduct which unduly and unreasonably protracted final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3). The statute is thus carefully tailored to shift fees only

In *Powell v. Alabama*, 287 U.S. 45, 69 (1932), this Court observed that "[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him." In deportation proceedings, both the perils of the system and the vulnerabilities of the participants are heightened enormously. The ABA has direct experience in deportation proceedings. After working with a major *pro bono* effort for those in deportation proceedings detained in South Texas, an ABA delegation concluded that "[u]nrepresented applicants who lack a knowledge of English language and our legal system face almost insuperable barriers to achieving asylum." ABA Asylum Report at 19.

The complexity of the immigration code is legendary, and it bears on a segment of our society that is ill-equipped to comprehend it:

> Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. There is nothing esoteric about the subject matter. The

when that would serve both to vindicate meritorious claims and to call an unreasonable agency to account. *See Commissioner, INS v. Jean*, 110 S. Ct. at 2321.

The amounts awarded under the administrative EAJA are a fraction of the EAJA's total cost. Between 1982 and 1989, a total amount of $1,770,308 was awarded, or an average of $221,288 each year. The number of applications filed has never exceeded 300, and the average award by an administrative agency has been $4,215, far below the $6,000 predicted by the CBO. *Annual Report of the Director of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act*, Appendix II (July 31, 1990).

There is no reason to believe that applications for EAJA fees in connection with INS adversary proceedings are inconsistent with this trend. Although it may not be definitive, an INS submission to the U.S. Department of Justice in connection with *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989), reproduced at pp. A5-A8 of the Appendix hereto, suggests that administrative EAJA's burden on the agency would be remarkably light.

> regulations concern simple matters of great concern to human beings, most of them of limited education.

Dong Sik Kwan v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

It has long been recognized that the guidance of counsel is particularly critical in the immigration area:

> Over fifty years ago it was observed that in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." [citation omitted]. Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity." [citation omitted]. *A lawyer is often the only person who could thread the labyrinth.*

Castro-O'Ryan v. INS, 487 F.2d 1307, 1312 (9th Cir. 1988) (emphasis added).

Asylum applicants who seek to navigate this system are faced with an adjudicatory process that has been the subject of persistent criticism. Decisions are often based on inappropriate criteria that are difficult to review in the absence of systematic articulation of standards. For example, the Refugee Act of 1980[13] was enacted primarily to ensure that asylum decisions are ideologically neutral. *See generally* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (Winter 1984); Note, *Political Bias in U.S. Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). Yet, many commentators report that the INS appears to deny asylum claims on the basis of undue deference to foreign policy. *See, e.g.*, Fagen, *Applying for Political Asylum in New York: Law, Policy and Administrative Practice* at 13 (1984) ("[I]n the

13 Pub. L. No. 96-212, 94 Stat. 102.

vast majority of cases the [immigration] judges' final decisions coincided with those of the [State Department]").[14]

The principal standard contained in the Refugee Act—demonstration of a "well-founded fear" of persecution—was described by this Court as containing "ambiguity . . . which can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. at 448. Numerous subsidiary statutory terms and issues of burden of proof plainly require similar elaboration. This development of case law can only be coherent and useful if it is accessible to participants in the process. Yet, the Anker Study reports that "[s]ome of the most important principles in the [administrative Board of Immigration Appeals'] jurisprudence have only been articulated in unpublished decisions. . . . The BIA also chooses to publish as binding precedent few cases in which asylum is granted." Anker Study, *supra*, at 255-256 n.8. Furthermore, "[s]ome of the published decisions are confused and contradictory." *Id.* at 255. The Anker Study concludes generally that:

> [T]he current adjudicatory system remains one of *ad hoc* rules and standards. Despite Congress' goals in creating statutory asylum procedures, factors rejected by Congress—including ideological preferences and unreasoned and uninvestigated political judgments—continue to influence the decision-making process.

Id.

To an adjudicatory setting fraught with uncertain standards and potential biases, aliens bring particular disabilities. The ABA delegation emphasized that "[s]pecial linguistic, cultural, and psychological disabilities make it extremely difficult for refugees to clearly articulate their experiences or

14 Recent statutory and regulatory changes may ameliorate some of these findings, but they are not yet fully implemented and they are no substitute for legal representation of applicants in individual cases.

freely discuss their views, particularly with government officials." ABA Asylum Report at 3.[15]

In the adjudicatory setting, as in the advisory setting, courts have recognized the critical role of counsel. *See, e.g.*, *Colindres-Aguilar v. INS*, 819 F.2d 259, 262 (9th Cir. 1987) ("[r]etained counsel could have better marshalled specific facts in presenting petitioner's case for asylum and withholding of deportation"); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) ("we are convinced that [the applicant's] asylum case will be more advantageously presented by retained counsel"); *Partible v. INS*, 600 F.2d 1094, 1097 (5th Cir. 1979) ("without the assistance of counsel, Partible was unable to explain the situation and to point out the unfortunate circumstances which singled her out [and] was unable to explore . . . difficult questions of . . . law"). The ABA delegation concluded that "[f]or applicants who lack knowledge of our language and legal system, full and effective representation by counsel is one of the most important factors to ensure a fair and accurate determination." ABA Asylum Report at 3.

To complete the paradigm of the situation envisioned by Congress when it enacted the EAJA, applicants must confront an agency that has been criticized for its unwavering opposition to even patently meritorious claims. The Anker Study, reviewing 149 asylum hearings conducted in a single immigration court over a two-year period, states that "[t]he trial attorneys took an oppositional stance in every case." Anker, *Determining Asylum Claims in the United States: An*

15 Communication problems are exacerbated by poor translations:

> The immigration court provides limited and poor quality foreign language interpretation for the majority of applicants, who are non-English speaking. Interpreters are chosen without any standardized selection criteria. . . . The credibility determination, an explicit factor in 42% of the decisions studied, is substantially affected by standard interpreter errors, for example, non-interpretation and misinterpretations of important parts of the applicant's testimony.
>
> Large portions of the hearing, including the basis of the decision denying the asylum claim, are not interpreted to the applicant.

Anker Study at 257.

Empirical Case Study at 81 (full report of data summarized in Anker Study; cited portion reproduced at p. A3 of Appendix). Anker continues, "In all cases the trial attorney decided to pursue deportation and never conceded to asylum until the hearings were completed." *Id.* at n.197. Another commentator asserts that "[e]ven when a refugee presents a strong asylum claim, the Immigration and Naturalization Service . . . generally contests the application by appealing an Immigration Judge's . . . decision." Stern, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 Yale L. J. 1459 (1988).

Not content with routine opposition at the hearing level, INS attorneys seem to " 'appeal every adverse decision regardless of the merits [and to] refuse to have stipulations.' " Watson, "No More 'Independent Operators': At INS, Lawyers in the Field Face New Regime," *Legal Times*, May 14, 1990, at 2 (quoting former INS General Counsel William Cook noting the practice and disapproving of it). *See also* Stern, *supra*, at 1471, citing May 2, 1988 Interview with Doris Meissner, former Acting Commissioner of the INS and now Senior Fellow, Carnegie Endowment for International Peace, for description of the agency's "vigorous opposition to adjudicated asylum claims, often *irrespective of the merits*" (emphasis added).

Indeed, there are reports of positive abuse. In the decision in *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990), the court related the problem of Salvadorans apprehended at the border who "are eligible to apply for political asylum and to request a deportation hearing prior to their departure from the United States," but who, in "the vast majority . . . sign voluntary departure agreements which commence a summary removal process." 685 F. Supp. at 1494. The Court found that:

> The widespread acceptance of voluntary departure is due in large part to the coercive effects of the practices and procedures employed by INS and the unfamiliarity of most Salvadorans with their rights under United States immigration laws.

Id.

The court in *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *rev'd in part on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985), describes other coercive practices—and their devastating results—employed with respect to Haitian refugees:

> [T]he Immigration and Naturalization Service . . . held mass "exclusion" hearings for Haitian immigrants to determine whether they were admissible to this country, or should be deported. Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand their rights. Pursuant to these faulty hearings many Haitians were adjudged excludable from this country, and were subject to deportation.

711 F.2d at 1462-63.

Not surprisingly, the GAO reports that asylum applicants who are represented by counsel before immigration judges are three times as likely to receive approval as those who are unrepresented. GAO, *Asylum: Approved Rates for Selected Applicants*, Appendix Table 1.1 (June 1987).

These observations and data suggest precisely the system of "truncated justice" and "coerced compliance" that the EAJA was designed to reform. *See* H.R. Rep. No. 1418, *supra*, at 10. In the EAJA's legislative history, the Committee Reports of both the House and Senate deplore the ability of "the Government with its greater resources and expertise [to] in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." S. Rep. No. 253, *supra*, at 5; H.R. Rep. No. 1418, *supra*, at 10. Both reports

underscore Congressional intent that "fee-shifting become . . . an instrument for curbing . . . the unreasonable exercise of government authority." S. Rep. No. 253, *supra*, at 7; H.R. Rep. No. 1418, *supra*, at 12.

Indeed, there are indications that the concept of fee-shifting itself might be of heightened effectiveness in the deportation context. The ABA delegation reported that:

> While sympathetic to detainees needs for representation, members of the bar with whom we met voiced concerns that the asylum process is so specialized, so complex, and so time consuming that providing pro bono assistance in even one case would be burdensome and unattractive to most practitioners.

ABA Asylum Report at 17. Obviously, the prospect of fees should additionally encourage a sympathetic bar to undertake representation of meritorious claims.

Yet, the INS asserts that it is exempt from the remedial measures of the EAJA because the procedural requisites of deportation hearings were modelled after, rather than expressly set forth in, the APA itself. This assertion simply should not hold under the weight of Congress' clearly expressed intent "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner, INS v. Jean*, 110 S. Ct. at 2321; *see also Sullivan v. Hudson*, 490 U.S. 877, 883 (1989), and "dual concerns of access for individuals and improvement of Government policies." *Commissioner, INS v. Jean*, 110 S. Ct. at 2322.

CONCLUSION

For all of the foregoing reasons, *amicus* American Bar Association requests that this Court hold that the EAJA applies to deportation hearings.

Respectfully submitted,

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APPENDIX

Determining Asylum Claims in the United States: An Empirical Case Study

The implementation of legal norms in an unstructured adjudicatory environment

By Deborah E. Anker

(Excerpt from unpublished draft being prepared for publication in N.Y.U. Journal of Law and Social Change, Fall 1991.)

[excerpt]

* * *

for the applicant.[195] In one case where the judge had entered an *in absentia* order because the lawyer arrived for the hearing late, and the judge stated he would reopen the case if the government agreed, the trial attorney refused. "My client [INS] wants a deport order. We couldn't have done better."[196]

195 Hearing no. 96. In this case, involving an Iranian Jew whose family had played a leadership role in a Jewish group in Iran, the trial attorney did not challenge the applicant's eligibility for asylum. The State Department had issued an opinion letter stating that the applicant had a well-founded fear of persecution in Iran, but suggesting that he was firmly resettled in Israel and therefore did not merit protection in the United States. Thus, the only issue was whether asylum should be granted or denied in the exercise of discretion. The applicant had spent some time in Israel (where he had the automatic right to citizenship) before coming to the United States and also had a criminal conviction in the United States for fraudulent use of a credit card. The sentencing judge in the criminal case had issued a formal "judicial recommendation against deportation." Despite the recommendation which precludes the use of conviction as a basis for deportation, or, under some precedents, as the basis for automatic denial of certain forms of discretionary relief, the immigration judge found that the applicant was statutorily ineligible for voluntary departure relief, based on the conviction. (*See* former 8 CFR Section 241.1 (1990). Note that this regulation was effectively repealed by the Immigration Act of 1990.) The trial attorney commented to the observer that the judge had made a mistake (the BIA has held that with such a recommendation, an alien is not ineligible for voluntary departure relief) and that the lawyer could have argued that the applicant could be awarded voluntary departure as a matter of discretion. He apparently did not feel under an obligation to inform the court or the applicant's lawyer of the error.

196 Hearing no. 193. In another case, a trial attorney commented to an observer that he believed trial attorneys should not oppose cases that were meritorious. Quoting a superior in the General Counsel's office, he said "if it's a real asylum case, you'll know it and the government shouldn't object."

The comment was made during a hearing in a case (no. 88) involving an Ethiopian who testified that he had been imprisoned and severely tortured as a result of his participation in an opposition political group. The observer notes that he testified well; an expert also testified that he would be killed if he returned. The judge indicated he was inclined to grant asylum and he asked for the trial attorney's position. The trial attorney stated that he ini-

The trial attorneys took an oppositional stance in every case.[197] In most cases, including in those in which the State Department opinions recommended a grant of asylum, the government did not concede that the applicant merited asylum until after a decision had been issued. In a meeting between lawyers and trial attorneys, the lawyers complained of this practice,[198] arguing (from the Trial Attorney's Hand-

tially agreed, but wanted to cross-examine. His cross-examination focused on the applicant's misrepresentations to the U.S. consul in order to obtain a visa to come to the United States. He also challenged the applicant, who had lived in France before coming to the United States, for not "wait[ing] his turn in line for U.S. refugee processing." He argued to the judge that since the applicant had lied to get a visa and was educated his entire case could have been fabricated. "He's smart enough to have memorized the country report for Ethiopia." Eventually the judge granted withholding of deportation, but denied asylum as a matter of discretion.

197 In all cases the trial attorney decided to pursue the deportation and never conceded to asylum until the hearings were completed. As noted, eventually, the trial attorney did not pursue an appeal to the BIA in five out of the seven cases granted. *See supra* note 52. (The two in which the INS did pursue an appeal were the Colombian Judge and Afghan cases.) There were very few exceptions, *viz.* the grants of asylum in the Nicaraguan and the Lebanese cases. In the Ghanaian case the trial attorney also agreed to asylum, but only after receiving a recommendation from the CIA.

The government's uncompromising oppositional stance is in some ways best illustrated in the Colombian judge's case. There the U.S. consul had given the judge a visitor's visa in order to facilitate his departure from that country because his life was in danger. The State Department had recommended that he be allowed to stay, for the same reason. This seemed to be a clear case in which the government should have exercised its prosecutorial discretion to allow him to stay, for example, in an extended voluntary departure status. Instead, when asked by the immigration judge what could be done to resolve the applicant's status, the trial attorney checked with his superiors and came back into court stating that "the position of the U.S. government is that Colombia is a democracy."

198 Lawyers complained of what they regarded as the trial attorneys' unbending oppositional stance with respect to other matters as well. One lawyer, for example, asked why it was the overwhelming policy of the trial attorneys to oppose expert witnesses ("The odds are so much in [the trial attorney's] favor and the respondent has the burden. [Their opposition is] pointless"). Later the same attorney complained that "The trial attorney will ask very detailed questions of the applicant—about omissions between the

book) that as representatives of the government, the trial attorneys have a responsibility to see that "justice is done." One trial attorney, while denying that no cases were unopposed, described the reasons for his contrary conceptions of the duties of the trial attorney. An asylum hearing, he argued, is not a criminal case in which the government has a burden to produce exculpatory evidence or to make choices in the interests of justice of efficiency not

* * *

application and the testimony or about exact dates. This is a low blow. Maybe you don't realize what we do to prepare. It's a rare client who reads every word in an affidavit; in Central American cases, they don't read at the level to pick up every discrepancy. It's not fair." While the federal and BIA case law now held that minor discrepancies should not affect credibility, she pointed out, the trial attorneys had not modified their cross-examination tactics.

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Washington, D.C. 20530

Re: *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989), and *In Re Hendyah Ahmed Shaker*, A27 560 431 (BIA, May 12, 1989).

Dear Ms. Simpson:

This is in response to the Attorney General's request for information about any other cases pending before the Board of Immigration Appeals (Board or BIA) presenting the issue of whether the award provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 404 and 28 U.S.C.A. § 2412 (Supp. 1989) apply to deportation and exclusion proceedings, and about any other cases in which an Immigration Judge (IJ) has awarded fees under EAJA.

INS Western Region has the following cases in which EAJA fees have been awarded or motions for fees have been made:

Maria Candelaria Cedillo-Vasquez, A34 592 130. The IJ awarded $1,575 on 8/16/89. Appealed to BIA on 8/30/89. (Los Angeles)

Arabo, A24 252 916. $1,658 awarded. Certified to the Board and still pending. (San Diego).

Susan Ying, A27 585 204. The IJ awarded $18,076.47 after granting suspension of deportation at a reopened deportation hearing. On appeal to BIA and awaiting transcription of the hearing. (San Francisco)

Pablo Anselmo-Martinez, A27 529 931. The IJ awarded $2,745 on 10/13/89. Appealed to BIA 10/17/89. (Phoenix)

Jose Rigoberto Reyes-Salgado. A28 754 607. On 12/5/89 the IJ awarded $4,577.52. Appealed on 12/11. Awaiting briefing schedule. (Phoenix)

Edward Keith Pittman. A36 396 129. Filed 10/26/89. Decision of IJ is pending. $5,497.36 in EAJA fees requested. (Phoenix)

Humberta Luz Martinez-Ramirez. A28 335 038. (also A28 335 035, 036, 037, 039, 040, 041). Motion filed 12/12/89. Service response pending. EAJA fees requested-$2,025. (Phoenix)

Alba A. Hernandez-Rivera. A29 323 958. Filed 12/1/89. Service response pending. $300 in EAJA fees requested for cost of reply brief to Service Motion for Summary Dismissal of Appeal. Decision of IJ pending. (Phoenix)

In addition, in Lai Fong Hui, A27 446 375, the IJ denied the motion for fees and the respondent appealed.

INS Southern Region has the following cases in which EAJA fees have been awarded:

Maria Isabel Saa. A28 852 512. The decision was appealed to the Board, which set aside the award on May 12, 1989. (Miami)

In Re Romman. A27 714 564. The IJ awarded $500. A motion to reopen has been filed with the IJ by the Service. (Atlanta)

INS Northern Region has the following cases involving EAJA fees:

Rassaud Rahmani, A23 641 348. This motion for $4,761 in fees is pending before the IJ. (Kansas City)

Kaivan Saidia, A23 641 562. This motion for $13,063 in fees is pending before the IJ. (Kansas City)

Rodolfo Padilla-Hernandez, A37 724 325. This motion for $13,063 in fees is pending before the IJ. (Kansas City)

H. Lincoln Stewart, A27 639 770. This motion for $10,205 in fees is pending before the IJ. (St. Paul)

Roger Miravete-Novello, A24 762 875. This motion for $1,960 in fees is pending before the IJ. (Chicago)

Francisco Gambou, A10 516 548. This motion for $972 in fees is pending before the IJ. (Chicago)

INS Eastern Region has no cases in which fees have been awarded. There has been one case in which an award was denied, which was appealed to the BIA:

Earle Clarke, A31 376 864. (This case was also appealed to the Court of Appeals for the 3d Circuit prior to a decision by the BIA). (Philadelphia)

The following cases have been received at the Board of Immigration Appeals (BIA):

Jose Escobar-Ruiz, A26 365 952. Appeal from a denial of fees. (Los Angeles)

Flor Hurtado-Cuadra and family (three cases), A27 616 005-007. Appeal from denial of fees. (Los Angeles)

Khadar Musa Hamide, A19 262 560 (eight cases). Appeal from denial of fees. (Los Angeles)

Muhamad Abbas Hashim, A29 065 949. EAJA fee motion pending with appeal on merits. (New York)

Hadi Eslamizar, A26 095 657. Appeal from denial of fees. (Phoenix)

Apolinar Hernandez Garza, A34 601 037. Remand from Court of Appeals to BIA; fees requested in connection with the remand. (Dallas)

Harold J. Amador-Castillo, A23 620 165. Appeal from denial of fees. (Harlingen)

Luis Gallardo-Lopez, A37 447 553. Appeal from denial of fees. (Harlingen)

Ana Lucia Hodge, A28 305 678. Appeal from denial of fees. (Houston)

Baldomero Delgado-Zamorano, A29 959 265. Appeal from denial of fees. (Harlingen)

The following cases are motions for fees filed directly with the BIA, and pending before it:

Rosa Nelly Valenzuela-Ortega, A24 835 087. (Los Angeles)

Abdul Wadi Bayaz, A28 732 910. (Los Angeles)

Jose Robles-Fuentes, A28 781 720 (Los Angeles)

Benigno Salvador Salas-Jordan, A27 413 750 (Los Angeles)

The case involving Hendyah Ahmed Shaker, A27 560 431, now before the Attorney General on certification, is also before the United States District Court for the Northern District of California, on a petition for declaratory judgment. The court continued the case, and urged the Attorney General to expedite his decision in the case. A status conference is set for May 4, 1990.

William P. Cook
General Counsel (Acting)

cc: Marc Van Der Hout, Esq.
Jonathan M. Kaufman, Esq.
Official file
Genco Log
Dixon

Clearances	*Initial*	*Date*
Division Head, J. Podolny	/s/ JP	2/1/90
Deputy GC, P. Virtue	/s/ PV	2/1/90
General Counsel (Acting), W. Cook	/s/ WC	2/1/90

INS:COCOU:EAJADD:DIXON:EWELL:633-2895/2/1/90